

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SALEM HOSPITAL CORPORATION, a/k/a
MEMORIAL HOSPITAL OF SALEM COUNTY,
Respondent Employer

and

HEALTH PROFESSIONALS AND ALLIED
EMPLOYEES, A/W AMERICAN FEDERATION
TEACHERS, AFL-CIO,
Petitioner

Cases 4-RC-21697
4-CA-37521
4-CA-37522
4-CA-37524
4-CA-37525

Patricia Garber, Esq., for the General Counsel.
Don T. Carmody, Esq. and *Bryan T. Carmody, Esq.*,
of Brentwood, Tennessee, for the Respondent.
Employer.
Andrew W. Allison, Esq. (Post and Schell), of
Philadelphia, Pennsylvania, for the Respondent.
Samuel J. Lieberman, of Washington, DC., for
the Petitioner.

DECISION

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

EARL E. SHAMWELL JR., Administrative Law Judge.¹ On May 19, 2010, Health Professionals and Allied Employees, associated with American Federation of Teachers, AFL-CIO (the Petitioner or the Union) filed its petition to represent certain employees working at Salem Hospital Corporation, aka Memorial Hospital of Salem County (the Respondent) in Case 4-RC-21697.

The Union's petition included the following described unit of employees employed at Memorial Hospital of Salem County.

Included: All full-time, regular part-time, and per diem Registered Nurses (including Staff Nurses and Case Managers.)

¹ I presided as the designated hearing officer over this matter in a hearing convened at the Philadelphia Regional Office of the National Labor Relations Board (the Board) on February 22, 2011.

Excluded: All other employees (including managerial and supervisory staff as defined by the National Labor Relations Act).²

On June 7, 2010, the Union filed initial unfair labor practice charges against the Respondent in Cases 4-CA-37521 and 4-CA-37522. On June 9, 2010, the Union filed an amended unfair labor practice charge against the Respondent in Case 4-CA-37522 and additional unfair labor practice charges in Cases 4-CA-37524 and 37525.

On August 2, 2010, the Regional Director (RD) for Region 4 issued her decision and direction of election (GC Exh. 1(l)).³ An election was held pursuant to the Regional Director's decision on September 1-2, 2010, with the following pertinent results.

1. Approximate number of eligible votes	142
3. Number of votes cast	73
6. Number of votes cast against the Union	48
7. Number of valid votes counted	121
8. Number of challenged ballots	21

The number of challenged ballots was not determinative of the results of the election. (GC Exh. 1(m).)

On December 21, 2010, the Respondent filed its objections to the election.⁴ On January 10, 2011, the RD issued her notice of hearing on the Respondent's objections.⁵

On January 19, 2010, the RD issued her order consolidating cases, consolidated complaint and notice of hearing wherein a complaint was issued in Cases 4-CA-37521, 4-CA-37522, 4-CA-37524, and 4-CA-37525, alleging that the Respondent had violated in various ways Section 8(a)(1) of the National Labor Relations Act (the Act) on June 7-9, 2010, during a Board hearing. On February 2, 2011, the Respondent timely filed its answer to the consolidated complaint essentially denying the commission of any unfair labor practice charges.

² GC Exh. 1(a).

³ A hearing officer of the Board conducted a hearing on or about July 27, 2010, to deal with the Respondent's claim that certain registered nurses (RNs) serving as charge nurses (CNs) should be excluded from the unit described above because they were supervisors. The Regional Director considered the evidence and arguments of the Union and the Respondent and determined that the Respondent failed to sustain its burden to establish the supervisory status of the RN/CNs and directed the election pursuant to the petition. It should be noted that on December 9, 2010, the Respondent's Request for Review of the Regional Director's Decision and Direction of Election was denied by the Board essentially because the request raised no substantial issues.

⁴ See GC Exh. 1(m). The Respondent filed 20 discrete objections alleging conduct that destroyed in its view the laboratory conditions under which the election should have been conducted, and requested that the election be set aside.

⁵ It should be noted that by letter dated December 30, 2010, the Respondent withdrew Objection 17. This withdrawal notice was contained in a footnote in the notice. At the hearing the Respondent, through retained counsel, reaffirmed the withdrawal of Objection 17. See GC Exh. 1(o).

On February 16, 2011, the RD issued her order severing cases, approving (the Union's) withdrawal request, and withdrawing the consolidated complaint whereby , inter alia, the unfair labor practice complaint was severed from the representation case and withdrawn.

5 On February 15, 2011, the Union filed a motion styled Request for Special Permission to Appeal, and Appeal to the National Labor Relations Board essentially requesting that the Board reverse the RD's determination to set the Respondent's Objections 1-16 for hearing and administratively dismiss these objections.

10 On February 22, 2011, the Board determined that the Respondent's Objections 1-16 were based on contentions which the Board (had previously) denied upon its review and order of December 9, 2010. Accordingly, the Board determined that as to the Respondent's Objections 1-16, there were no substantial and material factual issues that would warrant a hearing and remanded the proceeding to the Regional Director for action consistent with its
15 determination.⁶

On February 24, 2011, the Regional Director in a supplemental decision determined that consistent with the Board's February 22 decision and order that the Respondent's Objections 1-16 lacked merit and were accordingly overruled. As of the February 22, 2011 hearing the
20 Respondent's Objections 18-20 remained for decision.⁷

II. THE FEBRUARY 22 HEARING ON THE RESPONDENT'S OBJECTIONS 18-20

The only objections remaining for determination and decision are as follows:

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(18) The Election was conducted in circumstances where individuals who appeared to vote, and whose ballots were challenged, were not advised by the Board that there are two circumstances in which their votes could be determined, should their respective challenged ballots be opened and counted, thereby destroying the laboratory
30 conditions under which the Election should have been conducted.

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(19) The Election was conducted in circumstances where individuals who appeared to vote, and whose ballots were challenged, were subjected by the Board Agent conducting the Election to challenge procedures which failed to comply with the Board's R Case Manual, thereby destroying the laboratory conditions under which the
35 Election should have been conducted.

35

(20) The Election was conducted in circumstances where individuals who appeared to vote were allowed to vote in an environment which failed to preserve the sanctity of a "secret ballot election," and which failed to comply with the Board's R Case Manual, thereby destroying the laboratory conditions under which the Election should
40 have been conducted.

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⁶ On February 22, 2011, the Respondent electronically filed its response to the Petitioner's request. However, as noted in text above, the Board had made its decision both in accepting the request for special appeal and essentially administratively dismissing the pertinent objections. See Emp. Exhs. E1 and 2, copies of the Respondent's response and proof of its electronic filing of the response, respectively.

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⁷ At the hearing, I took administrative notice of the Board's February 22 determination and did not take any evidence on Objections 1-16. The RD's February 24 supplemental decision in my view should be given retroactive effect, that is, nunc pro tunc to February 22, 2011.

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A. The Respondent's Evidence in Support of Objections 18-20

The Respondent called only one witness, Darneesha Smith, to testify regarding
 5 Objections 18-20 and advised me that the witness was offering testimony relevant only to
 Objection 19.⁸

Darneesha Smith testified that she has been employed by Memorial Hospital of Salem
 10 County since June 2010 and cast a ballot in the election conducted on September 1 and 2,
 2010.

Smith explained the process she followed in casting her ballot as follows:

We just lined up at table, you gave your name, you name was checked off of the piece of
 15 paper, and then I was given a piece of paper and an envelope, and then there were—I
 think about three people at the table and when my name was called it [the piece of
 paper] just said "Challenged," and then I asked "Why?" I was referred to as—like a
 posting, and filled it out, sealed it in the envelope, dropped it in a box and that was it.
 [Tr. 45-46.]

20 Smith was asked by the Respondent's counsel if she had had a conversation with anyone in the
 (voting) room as to whether the way she voted could be observed or otherwise known. Smith
 replied as follows:

25 No, I just assumed, since it [the ballot] went into an envelope that it's a secret ballot.
 [Tr. 46.]

Smith was also queried by the Respondent's counsel if she had said to anyone in the (voting)
 30 room that someone had seen the way she had voted—if she had voted "yes" or "no." Smith
 replied as follows:

And no, we were behind the little—like there was a little partition there, so you just—you
 know, check "yes" or "no," or whatever, and then you just dropped it [the ballot] in the
 box. [Tr. 47.]

35 Regarding Objections 18 and 20, the Respondent did not produce or offer any evidence,
 testimonial or documentary, directly pertinent to these objections. Rather, in its post-hearing
 brief, the Respondent contends that the Board erred in the conduct of the election by failing
 properly to advise all voters regarding the secrecy of their ballots given the Board's oft-touted
 40 representation that all Board elections are secret-ballot elections.

The Respondent cites as proof of the Board's error, a statement in the Regional
 Director's Notice of Hearing on Objections to Election as follows:

45 ⁸ At the conclusion of Smith's testimony, I queried the Respondent's counsel as to which if
 not all of the objections was her testimony relevant. The Respondent's counsel stated that her
 testimony was relevant to Objection 19 and further that Objections 18 and 20 would be
 supported by the Respondent's legal position and argument. (Tr. 48-49.) It would seem to me
 that Smith's testimony coincides more with the allegations associated with Objection 20.
 50 Nonetheless, I have considered Smith's testimony to the extent pertinent with respect to all of
 the remaining objections.

Although the Board Agent running the election assured these voters that their votes would remain secret, she did not inform them of the circumstances under which their identities could be determined. [P. 2.]

The Respondent submits that this conclusion had to have been found after the Regional Director's investigation of the Respondent's objections. The Respondent contends that this statement stands as an acknowledgment that during the course of the election, the Board agent did not inform any voter whose ballot was being challenged of the two circumstances under which his/her vote could be determined.⁹

The Respondent contends that this failure to inform the voters whose ballots were challenged during the election undermined the Board's "guarantee" of a secret-ballot election and consequently destroyed the laboratory conditions necessary for a valid Board election. The Respondent submits that this information if provided could have had a serious "impact" on how voters choose to vote or to even participate in the election. Moreover, the Board agent's procedure not to inform voters whose votes could be challenged cast a serious prejudice on such voters because by the time they realize their vote choices may be revealed, it is too late to retract or change their vote.

The Respondent further asserts that the Board agent's failure to apprise the challenged voters that their votes would not be secret under two specific circumstances undermined the Board's guarantee of a secret-ballot election, which in turn destroyed the laboratory conditions required of a valid Board election.

The Respondent contends that its Objections 18, 19, and 20 should be sustained and the results of the election set aside.¹⁰

B. The Petitioner Union's Response to Objections 18–20

The Union first notes that it is undisputed that the 21 challenged ballots were less than the margin of victory for it, and that therefore these challenged ballots are not determinative. Second, the Union asserts that Objections 18–20 are essentially concerned with the challenged ballot procedures employed during the election by the Board agent.

This being said, the Union submits that even assuming arguendo, that the Respondent's claims have merit, the Board agent's alleged misconduct can only be applied to the 21 challenged voters, and therefore cannot have affected the outcome of the election since the number of challenged ballots was less than the margin of victory. Accordingly, the Union submits these objections should be dismissed because the alleged misconduct could only have

⁹ The Respondent contends that the two circumstances occur where (1) challenges are determinative of an election, the voter's selection or choice will be known if he is the sole challenged voter, and (2) where challenges are determinative of the election, the voter's selection or choice will become known if all of the challenged voters voted the same way. Of course, it bears reminding that the challenged ballots in the election here were not determinative of the election.

¹⁰ In spite of the Board's determination that Objections 1–16 should be in effect dismissed, and the Regional Director's formal dismissal of them pursuant to the Board's Order, the Respondent, nonetheless, seeks the sustaining of these objections, along with Objections 18–20. I have not dealt with Objections 1–16 based on the prior action of the Board.

resulted in speculative harm, which the Board deems insufficient to overturn an election. *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995).¹¹

5 In its posthearing brief, the Union submits that the Respondent's Objections 18–20 should be dismissed (overruled) because they are vague and unsupported by any competent evidence and are without foundation and merit under Board law and procedure governing elections.

10 Regarding Objection 18, the Union asserts that the gravamen of the objections is that the 21 challenged voters were not informed that their "identities" could be determined under the Respondent's hypothetical scenarios, neither of which was factually realized in the course of the election. The Union also submits that even if, *arguendo*, the Board agent did not apprise the challenged 21 of the two hypothetical situations, there is no rule under Board procedures which would require this. Then, too, the Union maintains the 21 challenged ballots are less than its
15 margin of victory and could not have affected the results of the election.

20 The Union contends, in essence, that the Respondent's claim that the Board agent engaged in objectionable conduct sufficient to overturn the election by not informing the challenged voters of certain hypothetical scenarios that could divulge their vote choices is simply not supported by the record evidence and in that sense is purely speculative. Moreover, there is no rule or requirement under any Board procedures governing elections that an agent inform challenged voters that their votes could be divulged under hypothetical scenarios simply conjured by the Respondent.

25 Turning to Objection 19, the Union asserts that this objection should be overruled and dismissed because the Respondent produced not even a scintilla of evidence to establish its claim of objectionable conduct by the Board agent conducting the election.

30 The Union notes that plainly the gravamen of Objection 19 is the conduct of the Board agent who allegedly failed to comply with (or follow) the challenged ballot procedures set out in the Board's Casehandling Manual, which failure allegedly destroyed the laboratory conditions of the election.

35 However, at the hearing, the Union points out the Respondent impermissibly attempted to append Objection 19 by alleging that the tally of ballots was incorrect. The Union submits that the Respondent could have at some preliminary stage amended its objections to include such a charge but did not and should not be allowed to do so at the hearing.

40 As to Objection 20, the Union notes that the Respondent produced only one witness, Smith, to establish its claim that the election was conducted under circumstances—an environment—in which the "sanctity" of a secret-ballot election was not maintained and in violation of the Board's Casehandling Manual.

45 However, the Union submits that Smith—who Respondent's counsel did not even know let alone prepare for the hearing—testified, leaving unanswered whether she was the challenged voter whose choice on her challenged ballot may have been seen by the Board

50 ¹¹ This aspect of the Union's opposition to the Respondent's objections was contained in its Motion to Dismiss Objections 18–20 submitted to me in open hearing on February 22, 2011; the Union also made an oral argument in support of the opposition at the hearing.

agent, as asserted by the Respondent in the Region's preliminary investigation of the objections.

The Union contends that the most that can be said of Smith's testimony is that she did not believe that her vote choice may have been seen by the Board agent. The Union asserts that this would constitute a direct contradiction of the purely speculative assertion of the Respondent.

As to the assertion in Objection 20 that the Board agent's failure to maintain secrecy of the voter's choice was in violation of the Casehandling Manual, the Union notes that counsel for the Respondent averred that he would make legal arguments regarding this assertion. The Union essentially contends that a "legal argument" is not evidence of the Board agent's failure to comport herself in compliance with the Casehandling Manual and, having produced no fact-based evidence of the Board agent's purported failure, this aspect of Objection 20 should be overruled and dismissed.

III. THE APPLICABLE LAW

A. The Board's Standards for Sustaining the Results of an Election

In the context of a representation election, the Board employs an objective test of the conduct of a party charged with interfering with the employees' freedom to choose their representative. The objecting party must show that, inter alia, the conduct in question affected the employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252 (2005); *Avante At Boca Raton, Inc.*, 323 NLRB 555, 560 (1997); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers the following factors:

(1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.¹²

Notably, representation elections are not lightly set aside. *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325, 328 (5th Cir. 1991); the burden of proof is on the party seeking to set aside a Board-supervised election to show that the specific conduct in question had a reasonable tendency to affect the outcome of the election. *Affiliated Computerizing Services*, 355 NLRB No. 163 (2010).

¹² *Taylor-Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

B. Relevant NLRB Casehandling Provisions

The Board's election process is governed by the NLRB Casehandling Manual. For purposes of the instant matter, Part Two, Sections 11300–11350 are pertinent, particularly
 5 Section 11338, et seq., dealing with challenged ballots.¹³

Section 11338 provides:

10 The challenge procedure provides a method whereby a voter's eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved and the questioned voter may memorialize his/her desires in the event these desires should have relevance in the future—all without disrupting the regular flow of votes.

15 Section 11338.1, in pertinent part, provides guidance where there are questions about voter eligibility or unit placement in the course of an election, as follows:

20 When a request for review of a Regional Director's Decision and Direction of Election raises questions concerning a ruling on eligibility or unit placement, the Board may choose to postpone ruling by directing that those employees in the disputed classification be permitted to vote subject to challenge. Also, if the Board has not ruled upon or has granted a request for review, it may be necessary at the election to challenge and/or to segregate and impound ballots. Secs. 11274, 11302.1(a), 11338.2(b), and 11338.8; Sec. 102.67(b), Rules and Regulations. *In any of these*
 25 *circumstances, the Board agent is responsible for challenging such ballots if no party does so.*¹⁴ When a large number of challenges can be expected in a case, it may be desirable to prepare challenge envelopes in advance, to the extent possible.

30 In Section 11338.2, the manual sets out who may challenge a voter, namely observers (Sec. 11338.2(a) and Board agents (Sec. 11338.2(b)).

Section 11338.2(b) provides the procedures Board agents are to follow in the case of challenges:

35 The Board agent must challenge anyone whose name is not on the eligibility list or who has been permitted by the Regional Director or the Board to vote subject to challenge (Sec. 11338.8). Also, the Board agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote, but in this instance only if none of the parties voices a challenge on that ground.

40 The Board agent will not make challenges for parties when such parties have observers present. *Galli Produce Co.*, 269 NLRB 478 (1984). However, if any party does not have an observer, the Board agent should, upon request and on good cause alleged by the party, state that party's challenge to a voter whose eligibility that party questions. The Board agent should advise the party that he/she does not assume
 45 responsibility for assuring that the voter's ballot will be challenged. The challenge is not

50 ¹³ The General Counsel moved to admit copies of the challenged ballot provisions of the Casehandling Manual, Part Two, Sec. 11338, et seq., at the hearing. I received them and these were marked Region Exh. 3.

¹⁴ Emphasis added.

made by the Board, but is in terms of stating the party's challenge (e.g., "the union has challenged your right to vote on the ground that you are a supervisor").

When directed by the Regional Director or the Board, the Board agent's challenge is to be expressed in terms of the basis for the Regional Director's or the Board's reservation. (For example, the Regional Director (or the Board) has been unable to decide whether you are eligible to vote based on the union's contention that you are a supervisor rather than an employee.") The voter should then be voted under the challenge.

The reason for the challenge should be stated at the time the challenge is made.

Section 11338.3 sets out the challenge procedures as follows:

When a voter is challenged, a small "c" is placed beside his/her name by the checking observer for the challenging party. The other observer should make the usual check mark. (If the voter's name does not appear on the list, it should be added to the list, and the "c" inserted.) *The Board agent (at the checking table or, in a large election, at a challenge table) fills out the information called for on the stub of a challenged ballot envelope—the voter's name, job classification, employer, place and date of election, the reason given for the challenge, the identity of the challenger, and the agent's initials. If time permits, the agent may elicit specific information surrounding the voter's status, for insertion on the reverse side of the stub, which should be initialed by the voter.*

The voter is then given a ballot and instructed to enter the booth, mark the ballot, fold it so as to keep the mark secret and return to the voting table. *The Board agent and the observers should make sure that when the challenged voter comes out of the booth, he/she goes to the voting table and does not drop the ballot in the box before placing it in the envelope.*¹⁵ On return to the voting table, the voter should be required to display the ballot, without disclosing how it is marked. The voter is then given a challenged ballot envelope. The voter places the marked ballot in the challenged ballot envelope, seals the envelope and drops the envelope in the box.

Section 11338.5 provides instructions regarding the proper time to challenge and the Board agent's responsibilities in this regard as follows:

Challenges should be handled as they come up, if feasible. Challenged voters should not be told to return later; however, they may be permitted to remain at the polling place awaiting a slack period.

In the Board agent's oral instructions to observers, the Board agent should urge the observers to challenge as the voter comes up to the checking table. Sec. 11318.2. Normally, a challenge should be made before the questioned voter receives a ballot. However, a challenge voiced at any time before the ballot is dropped into the ballot box should be honored.

Section 11338.6 instructs that (during the election) arguments on the merits . . . should not be permitted and . . . (in pertinent part). The challenge steps outlined above should be taken quietly and quickly and the regular voting flow should be impeded as little as possible.

¹⁵ Emphasis added.

*The Board agent should be prepared to explain to the voter the measures that will be taken to protect the secrecy of the challenged ballot.*¹⁶

IV. Discussion and Conclusions

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First, so that the record is crystal clear, consistent with the Board's and the Regional Director's decisions, I have not treated with or considered in any respects the Respondent's Objections 1-16.

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Second, as the Board authorities dictates, the objecting party in a representation election has the burden of proof to show that specific conduct affected the employees in the voting unit and that conduct had a reasonable tendency to affect the outcome of the election.

15

In my view, the Respondent here simply did not meet its burden with respect to the remaining Objections 18-20. I would recommend overruling and dismissal of these objections. My reasons include the following considerations.

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One, the Respondent did not adduce in my view any evidence that could be considered conduct, objectionable or otherwise, by any person with the possible exception of the Board agent who was not called by the Respondent to testify at the hearing; I will discuss this point later herein. In agreement with the Petitioner, the record here is essentially devoid of any conduct that one could advance as objectionable. The Respondent's main contentions as I viewed them related to complaints about the election process undertaken by the Region. That issue was disposed of by the Board and is of no moment for purposes of Objections 18-20.

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In agreement with the Petitioner, the Respondent here seems to me to have conjured or created out of whole cloth objectionable conduct by way of hypothetical scenarios not supported by any facts. As noted by the Petitioner, any such approach will only produce a speculative result which cannot satisfy the Board's standards and the governing Board rubric that representation elections are not to be lightly set aside.

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Turning to the only "conduct" in any way arguable in this matter, the Respondent asserts that the Board agent's alleged failure to comply with the Casehandling Manual, coupled with her also not giving the challenged voters information as to how their choices could be disclosed, destroyed the laboratory conditions of the election.

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It should be noted once again, that the Board agent was not called by the Respondent to explain her role and actions in the conduct of the election. In my view, this was obligatory if indeed the Respondent were to establish the specific improper conduct on the Board agent's part. However, the Respondent argued that the statement in the Regional Director's notice of hearing constituted an "admission" by her of the Board agent's failure to advise challenged voters of circumstances under which their identities could be determined. I wholly disagree with this assertion.

45

First, as I read the entire paragraph in which the statement appeared, it seems clear that the Regional Director was merely reiterating the evidence the Respondent had submitted in the preliminary investigation and in accord concluded that the Objections (18-20) raised substantial and material issues of fact best resolved in a hearing.

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¹⁶ Emphasis added.

Second, the statement in question was not contained in a pleading where, of course, admissions may be made. The statement was made in a mere notice of hearing, which cannot serve in my view any evidentiary purpose to establish specific objectionable conduct.

Third, as set out in this decision, the Casehandling Manual does not impose any obligation reasonably implied or inferential that a Board agent is required to inform voters, challenged or otherwise, of any circumstances under which their identities could be determined. The Board agent's charge essentially is to ensure the proper and fair conduct of the election and, among other important duties, take the necessary steps to ensure ballot secrecy. In my view, it is highly unlikely that the Regional Director would "admit" that a Board agent was required to do something not set out in the manual or otherwise required by the Board to secure a valid election.

To the extent that the Respondent attributes objectionable conduct affecting the election to this "admission," I will find and conclude that the objection should not be sustained.

I note in passing that the only witness called by the Respondent, Smith, did not establish in my view any conduct by the Board agent that could serve as objectionable conduct sufficient to set aside the election. While Smith did not testify at any particular length, she did in my view supply sufficient evidence for me to conclude that the Board agent did not engage in any conduct that could be reasonably said to have undermined ballot secrecy or caused Smith any discomfort in participating in the election.

Since the Respondent elected not to call the Board agent, on this record I cannot but conclude that the Board agent here maintained and protected the integrity and neutrality of the Board's election procedures. I would recommend overruling and dismissal of Objections 18-20 to the extent that the objections rest on the alleged conduct of the Board agent conducting the election. I would find and conclude that the conduct of the Board agent was appropriate and correct, and the Respondent's objection to her conduct is without merit.

Based on my findings and conclusions as stated above, I recommend that the Board overrule the Respondent's objections in their entirety and not set aside the results of the election found herein.

I recommend that the Regional Director be directed to take all the necessary steps to certify the results of the election consistent with my findings and conclusions herein.¹⁷

Dated, Washington, D.C. March 23, 2011

Earl E. Shamwell Jr.
Administrative Law Judge

¹⁷ Pursuant to the provisions of Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereof. Exceptions must be received by the Board in Washington, D.C., by April 6. Immediately upon the filing of such exceptions, the party filing same shall serve a copy upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.